

The Enforcement of Foreign Arbitral Awards in the UAE: A Recent Judgment of the ADGM Court of First Instance

John Gaffney - Senior Counsel - Arbitration / Competition
- Abu Dhabi

Malak Nasreddine
m.nasreddine@tamimi.com - Abu Dhabi, UAE



Introduction

On 23 September 2019, in the case of A4 v. B4 (ADGMCFI-2019-008), the Abu Dhabi Global Market Court of First Instance (the 'Court') issued its third arbitration-related judgment this year.

The Court considered an unopposed application for the recognition and enforcement of a foreign arbitral award (the 'Award') issued in an arbitration seated in England pursuant to the Rules of Arbitration of the London Court of International Arbitration (the 'LCIA Arbitration Rules').

In granting the application, the Court addressed three central questions: (a) whether it had jurisdiction to recognise and order the enforcement of the Award; (b) whether it was entitled to determine the validity of the arbitration agreements invoked by the Claimant; and (c) whether the enforcement of the Award would breach UAE public policy.

Background

The Claimant, a company registered in Abu Dhabi, provided certain services to the Respondent, a company also incorporated in Abu Dhabi, under five contracts. A dispute arose as to unpaid sums owed in respect of services that the Claimant provided to the Respondent in connection with the "X" Project, Abu Dhabi (the details of the project were redacted by the Court in its judgment to preserve confidentiality).

On 8 March 2018, the Claimant initiated arbitration proceedings seated in England under the LCIA

Arbitration Rules against the Respondent. On 3 August 2018, the LCIA appointed a sole arbitrator.

In the LCIA arbitration proceedings, the Claimant argued that it had provided services to the Respondent under five contracts, all of which incorporated “General Terms and Conditions of Sale” (the “Claimant’s T&Cs”) (and also relied upon “Comprehensive Order Acknowledgement Letters”). Article 26 of the Claimant’s T&Cs provided that English law was the governing law. Article 25 stated that, in the event of a dispute that was not resolved through other stipulated procedures, the matter would be

“referred to binding arbitration in London under the auspices of, and pursuant to the rules of, the LCIA as then in effect, or such other procedures as the parties may agree to at the time ...”

The Claimant’s T&Cs also stated that, subject to Article 25, the contracts would be subject to the non-exclusive jurisdiction of the English courts.

The Respondent initially argued that there was no agreement between the parties that justified the Claimant’s initiation of arbitration proceedings under the LCIA, as it had referred in its Purchase Orders to its own “Terms & Conditions” to be applied and which did not provide for LCIA arbitration. The Respondent thus challenged the “jurisdiction of LCIA since there is no Privity [sic] of agreement between the parties, as a result, an Arbitral Tribunal lacks jurisdiction to hear any disputes between [the Claimant] and [the Respondent] or any complaints which [the Claimant] purports to have in relation to [the Respondent]”.

The Respondent took no part in the proceedings and did not develop its initial challenge.

The sole arbitrator rejected the Respondent’s challenge and made an award in the Claimant’s favour on 14 November 2018 in England (the ‘Award’).

On 25 June 2019, the Claimant applied to the Court for the recognition and enforcement of the Award. The Respondent did not participate in the Court proceedings.

Judgment of the Court

The Court ordered the recognition and enforcement of the Award, being satisfied that none of the grounds for refusing recognition and enforcement of the Award set out in Section 57 of the ADGM Arbitration Regulations (‘Regulations’) was satisfied.

The Jurisdiction of the Court

First, the Court determined that it had jurisdiction to recognise and order the enforcement of the Award in accordance with the Regulations.

Part 4 of the Regulations applies to the recognition and enforcement of what are referred to therein as “New York Convention Awards” i.e., “an award made, in pursuance of an arbitration agreement, in the territory of a state which is a signatory to the New York Convention (other than the UAE)”. Since the United Kingdom is a signatory of the New York Convention, the Court determined that the Award was an award to which Part 4 of the Regulations applied.

Section 56(1) of the Regulations provides that a New York Convention Award must be recognised as binding and must be enforced within the ADGM as if it were a judgment of the Court itself. Section 56(5) of

the Regulations provides that:

“Awards recognised by the Court may be enforced outside the Abu Dhabi Global Market in accordance with the applicable legislation in force and recognition under these Regulations includes ratification for the purposes of any such applicable legislation”.

The Court therefore determined that it had jurisdiction to recognise and order the enforcement of the Award. Since Section 56 of the Regulations is mandatory, the Court determined that it was required to recognise and enforce the Award unless one of the grounds for refusing recognition or enforcement under Section 57 was satisfied.

The Validity of the Arbitration Agreement

Second, the Court held that it did not have jurisdiction to determine whether the arbitration agreement was valid.

The Court stated that it was faced with a “battle of forms”. This is because the Claimant referred to the Claimant’s T&Cs and documents called “Comprehensive Order Acknowledgement Letters” in the proposals and quotations it submitted before the five contracts were concluded. Meanwhile, the Respondent referred to “Terms & Conditions to be applied as per attached Annexure 1” (which, as the Court determined, did not provide for LCIA arbitration) in its Purchase Orders.

The Court, however, concluded that it was only entitled to consider the foregoing issue in accordance with Section 57(1) of the Regulations. The Court thus could refuse to recognise or enforce the Award if:

“the party making the application [that recognition and enforcement of the Award be refused] furnishes proof that...the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made”.

In other words, the Court concluded that it could refuse recognition and enforcement of the Award only if the party, against whom enforcement of the Award is invoked, submitted sufficient evidence to establish the alleged invalidity of the arbitration agreement. While the Regulations did not expressly require the Respondent to make an application that recognition and enforcement of the Award be refused, Section 57(1) reflects the provisions of the New York Convention. Article V.1 of the New York Convention states:

*“Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority proof that:
(a) The parties to the agreement ... were, under the law applicable to them, under some incapacity, or the ... agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made...”.*

As noted above, the Respondent however, did not participate in the Court proceedings. The Court held that, although the Respondent raised this objection before the sole arbitrator in the LCIA arbitration proceedings, it did not pursue this contention in the Court proceedings and did not request, prove or seek to prove, that the arbitration agreements upheld by the arbitrator were not valid, or that the Award was

made under invalid arbitration agreements. In these circumstances, the Court held that it did not have the jurisdiction to determine whether the arbitration agreement was valid.

No Breach of UAE Public Policy

Third, the Court held that “there is no reason on the facts of this case to refuse the claim on grounds of the public policy of the UAE”.

Section 57(1) of the Regulations also provides that the Court may refuse recognition or enforcement of an arbitral award if “the recognition or enforcement of the award would be contrary to the public policy of the [UAE]”. This reflects Article V(2) of the New York Convention, which states:

“Recognition and enforcement of an arbitral award may ... be refused if the competent authority in the country where recognition and enforcement is sought finds that(b) The recognition or enforcement would be contrary to the public policy of that country”.

Since both parties are Abu Dhabi registered companies, the Court raised the question:

“Should this Court be concerned about whether A4 might be seeking recognition and enforcement of the Award not in order to enforce it against assets in the ADGM, but as a device to have an order of this Court (rather than the Award itself) enforced elsewhere in the UAE, and in particular elsewhere in Abu Dhabi, without having other UAE Courts, including those of the Abu Dhabi Judicial Department (“ADJD”), examine for themselves whether the Award should be recognised and enforced within their jurisdictions?”

The Court considered the reference to “public policy of that country” in the New York Convention in light of the UAE regime. Mr Justice Andrew Smith stated that:

“I would need little persuasion that it is desirable and in the public interest that the different Courts of the UAE work together harmoniously and that there be an orderly distribution of jurisdiction between the Courts of Abu Dhabi and more generally of the UAE”.

The Court concluded that this question did not fall for determination in the present case. Where a party wishes to rely on considerations of public policy to resist the recognition and enforcement of an award, the burden of proof lies on the party making the application (see e.g., *Minmetals Germany GmbH v Ferco Steel Ltd.*, [1999] 1 All E R 315 per Colman J).

The Court also recognised that it had jurisdiction to rule on an illegality or other public policy issue on its own motion, but it would still require a sound factual basis for doing so. In this case, there was none.

There was no evidence that the Respondent did not have, or would not have, assets within the ADGM at present or in the near future (considering that the Respondent did not participate in the ADGM proceedings). The Court thus determined that there was no reason to suppose that the Claimant sought recognition and enforcement in these proceedings simply as a device to execute against assets elsewhere in the UAE.

There was also no evidence that there might be duplicate proceedings in the ADGM and other courts in the

UAE. The Court found that the Respondent had not brought proceedings to challenge the Award, and there was no evidence that it intended to do so. There was also no evidence that the Claimant had brought proceedings in other courts of the UAE, and there was no evidence that it intended to do so. And even were the Claimant to initiate similar proceedings before other courts of the UAE, the Court felt that it would not, in itself, be objectionable or contrary to the public policy of the UAE to have parallel enforcement proceedings in different jurisdictions of the UAE (see e.g., decision of the Joint Judicial Committee of Dubai in *Assas Investments Ltd. v Fius Capital Ltd.*, Cassation No 6 of 2017).

The Court also added that the Respondent would not suffer any unfairness or any detriment as a result of the Award being recognised and enforced by order of the Court rather than, or in addition to, by order of another court of the UAE. The Court thus concluded that there was no reason to refuse recognition and enforcement of the Award on the grounds of the public policy of the UAE.

Commentary

The judgment is notable for a number of reasons.

First, the Court concluded that, in the absence of a challenge by the Award debtor to the recognition and enforcement of the Award, the Court could not question on its own motion the validity of the underlying arbitration agreement.

Second, in contrast to the foregoing, the Court confirmed that it could rule on public policy or illegality issues of its own volition but would require “a sound factual basis for doing so”.

Third, the judgment underlined the desire of the Court to contribute to “harmonious and effective cooperation between the courts of Abu Dhabi” in order to ensure the orderly distribution of jurisdiction between the courts of Abu Dhabi and more generally of the UAE.

Fourth, the Court also established that parallel enforcement proceedings in different UAE courts would not necessarily be objectionable to UAE public policy. In the present case, it concluded that the recognition and enforcement of an arbitral award by the Court, as opposed to another UAE court, would not cause any detriment to the party against whom recognition and enforcement was invoked.

It remains an open question however, as to the impact of a party proving that it would suffer unfairness or any detriment as a result of the Award being recognised and enforced by the Court rather than or in addition to by order of another UAE court or courts.

Finally, the Court left open the question of the potential impact the non-existence of assets in the ADGM, against which enforcement might be made, might have on applications for recognition and enforcement of arbitral awards by the Court.

Al Tamimi & Company's [Arbitration team](#) regularly advises on arbitration-related matters. For further information, please contact [John Gaffney \(j.gaffney@tamimi.com\)](mailto:j.gaffney@tamimi.com).